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"No se quede atrás."

The tag line splashed on bus posters and in newspaper advertisements during March and April of 1988 was a simple admonishment: "Don't be left behind."[1] The advertisements printed and distributed by the Immigration and Naturalization Service (INS) presumably were meant to encourage potential applicants to apply for amnesty under the 1986 Immigration Reform and Control Act (IRCA)[2] before the May 4, 1988, deadline.

This simple message was ironic considering the realities of the IRCA amnesty program. The regulations promulgated by the INS on public charge exclusions actually leave many behind.[3] Some are left behind because the INS regulations prevent potential applicants from qualifying or even applying for amnesty.[4] Other undocumented people, who have applied and qualified for amnesty, now find themselves economi-

* This note is dedicated to Frances Martinez, Director of the Legalization Program of Catholic Community Services in Sacramento, California and an advocate for immigrant's rights for more than fifteen years.

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1. The English translation of "no se quede atrás" is "don't be left behind."

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359 (codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

3. The Immigration and Nationality Act has historically included a provision excluding aliens who are likely to rely on the receipt of public assistance for their subsistence from obtaining residency in the United States. Immigration and Nationality Act, Pub. L. No. 52-414, §§ 212(a)(8), (15), 66 Stat. 163 (codified at 8 U.S.C. §§ 1182(a)(8), (15) (1988)) [hereinafter INA].

4. *See infra* notes 95-119 and accompanying text.

cally left behind because of a statutory five year ban on the receipt of public assistance.[5]

Congress enacted the IRCA in 1986 primarily to control illegal immigration by imposing sanctions against employers who hire undocumented workers.[6] The amnesty program was created to give undocumented immigrants with six years of continuous residency or employment in agricultural labor an opportunity to legalize their immigration status.[7] This Note focuses on the largest group of applicants, "legalization" applicants, who must prove they have lived continuously in the United States since before January 1, 1982, in addition to fulfilling other requirements of the statute.[8]

Single women with children comprise a large portion of the legalization applicants.[9] Approximately thirty percent of all undocumented persons[10] live at or below the poverty income guidelines established by the federal government.[11] Nationwide, families headed by single women comprise almost ninety percent of the people who receive Aid to Families with Dependent Children (AFDC).[12] These statistics support an inference that single, undocumented women with children, including thousands of women who otherwise qualify for the amnesty program, may be denied amnesty or may have been discouraged from applying because of the public charge exclusion regulations promulgated by the INS.

In April 1988 San Mateo County Legal Aid and California Rural Legal Assistance (CRLA) filed *Zambrano v. INS*, a class action suit on

5. INA, *supra* note 3, § 245A(h), *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. § 1255a(h) (1988)).

6. INA, *supra* note 3, § 274(a), *amended by* IRCA, *supra* note 2, § 101(a) (codified as amended at 8 U.S.C. § 1324(a) (1988)).

7. INA, *supra* note 3, § 245(a) (codified at 8 U.S.C. § 1255(a) (1986)); INA, *supra* note 3, § 210, *amended by* IRCA, *supra* note 2, § 302(a) (codified as amended at 8 U.S.C. § 1160 (1988)).

8. INA, *supra* note 3, § 245A, *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. § 1255(a)(2)(A) (1988)).

9. Plaintiffs' Complaint at 20, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988) [hereinafter Plaintiffs' Complaint].

10. Many members of the immigration rights community prefer the term "undocumented person" to "illegal alien," the term often used by the government. The term "undocumented person" is perceived as more humane and indicative that no human being can be illegal.

11. Wheeler & Zacovic, *The Public Charge Ground of Exclusion for Legalization Applicants*, [64 No. 35] INTERPRETER RELEASES 1046 (Sept. 14, 1987) (citing Rumbaut, *The Politics of Migrant Health Care: A Comparative Study of Mexican Immigrants and Indochinese Refugees*, in 7 RESEARCH IN THE SOCIOLOGY OF HEALTH CARE 13 (Wertz ed. 1987)).

12. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS (1986). Although undocumented aliens cannot receive AFDC, their United States citizen children can.

behalf of potential applicants adversely affected by these regulations.[13] Of the six named plaintiffs, five are single women with children.[14] On July 31, 1988, United States District Court Judge Edward J. Garcia issued an order granting relief to the plaintiffs.[15] Judge Garcia found that the INS's Proof of Financial Responsibility [hereinafter PFR] regulations[16] violate the IRCA by failing to incorporate the traditional prospective test for determining whether an undocumented person is likely to become a public charge.[17] He also found that the regulations were more restrictive than the statute: "1) they apply a retrospective test rather than a prospective test; 2) they attribute public cash assistance provided to family members to the applicant; and 3) they require applicants to apply for a waiver before applying the special rule embodied in the statute."[18] Judge Garcia rejected the contention of the INS that its clarification memoranda and decision in December 1988 to change the regulations made the issue moot.[19] The court noted that the INS did not address either the situations of applicants who applied before the regulatory changes were made, or of the class of potential applicants who failed to apply because they had relied on the challenged regulations.[20]

The order permanently enjoins the INS from applying the PFR regulations to all legalization applications.[21] It also requires the INS to notify all individuals who reside in the jurisdiction whose applications were denied or recommended for denial based on the PFR regulations that they may be eligible to apply now.[22] Judge Garcia also required the INS to accept applications from potential applicants who were discouraged from filing applications and to work with the plaintiffs' attorneys to establish evidentiary guidelines to prove that these applicants received information that led them to believe that they were ineligible.[23] Finally, the court ordered the INS to report the provisions of the order and the proper standards for public charge exclusion cases to all INS district of-

13. Plaintiffs' Complaint, *supra* note 9.

14. The named plaintiffs are: Marta Zambrano, Margarita Rodriguez, Graciela Lopez, Andrea Ruiz, Martha Ozuna, and Jorge Perdomo.

15. Order Granting Plaintiffs' Motions for Partial Summary Judgment, Permanent Injunction and Redefinition of Class, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. July 31, 1989) [hereinafter Order of July 31, 1989].

16. *See infra* notes 66-92 and accompanying text for a description of the regulations.

17. Order of July 31, 1989, *supra* note 15, at 5.

18. *Id.*

19. *Id.* at 5-7.

20. *Id.* at 7.

21. *Id.* at 17.

22. *Id.* at 18.

23. *Id.* at 20.

fices, Qualified Designated Entities [hereinafter QDEs],[24] community, social, and immigrants' rights organizations, and the media.[25] The United States Attorney has appealed the district court decision to the United States Court of Appeals for the Ninth Circuit.[26]

This Note focuses on the public charge exclusion regulations promulgated by the INS. In particular, this Note explores how the INS exceeded its statutory authority in promulgating overly restrictive regulations and how these regulations violate the Equal Protection Clause of the United States Constitution as well as international human rights treaties and customary international law.

Section one focuses on the experiences of one individual, a single woman with four children, and how she overcame the public charge exclusion. Her story illustrates the problems faced by thousands of other undocumented single women with children as they attempt to legalize their status in the United States and continue to provide for their families.

Section two gives an historical overview of the IRCA and the public charge exclusion of the Immigration and Naturalization Act (INA). Section three discusses how the INS has misinterpreted congressional intent and exceeded its statutory authority by promulgating regulations that adversely affect thousands of applicants and potential applicants, particularly single women with children. The section then portrays three classes of people affected by the INS regulations. The first two classes are people who did not qualify for amnesty under the initial program because of their past receipt of public assistance or because the general confusion about the meaning of the public charge exclusion regulations discouraged them from applying. The third group is composed of people who did

24. QDEs are community and immigrants' rights organizations authorized by the INS to provide quasi-official assistance to IRCA amnesty applicants. IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. § 1255a(c)(2) (1988)).

25. Order of July 31, 1989, *supra* note 15, at 22-23.

26. Since the appeal was filed, Judge Garcia has also ruled on two Plaintiffs' motions. On December 11, 1989, Judge Garcia found the INS in contempt for refusing to process the applications of people who were discouraged from applying and now wanted to apply for amnesty. Judge Garcia also held that the INS may limit applicants to people who were discouraged from applying based on their receipt of *cash* public assistance, such as AFDC and General Assistance. The INS may deny applications from people who were discouraged from applying due to their receipt of non-cash public assistance, such as food stamps. Order Granting in Part and Denying in Part Plaintiffs' Motion for Contempt, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Dec. 11, 1989). Plaintiffs appealed but were denied reconsideration. Judge Garcia also refused to extend the deadline more than six months. Order Denying Plaintiffs' Motion for Reconsideration, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Jan. 12, 1990). These orders have been appealed and cross-appealed to the Ninth Circuit. Notice of Appeal, Zambrano v. INS, No. 89-16014 (9th Cir. Feb. 7, 1990); *id.* (Mar. 8, 1990).

qualify for the first stage of the amnesty program but still face obstacles in attaining permanent lawful residency status.

Section four argues that the public charge exclusion, as interpreted by the INS, violates the Equal Protection Clause of the United States Constitution and international law by its de facto discrimination against single women with children.

This Note concludes with a proposal for correcting the misinterpretations of the IRCA by the INS and for establishing regulations that will address the intentions of Congress and give single women with children an equal opportunity to achieve immigration amnesty and realize their dreams and hopes for economic freedom and human dignity.

I. ONE WOMAN'S STORY—ALICIA ALVARADO

Alicia Alvarado[27] is typical of women who apply for amnesty under the IRCA program. Alicia qualified for the first stage of amnesty, but she still faces severe economic and immigration problems. In this section of the Note, I relate my experiences with Alicia.[28]

I first met Alicia Alvarado in June 1987 at the Hispanic Apostalate in Sacramento, California. I was a legalization counselor[29] for Catholic Community Services, and Alicia came to the Apostalate to apply for legalization.

Alicia is a single mother with four children, all under ten. Her United States citizen children had been receiving AFDC off and on for a number of years. At the time, our organization had heard that receipt of AFDC by United States citizen children could be imputed to their parents applying for IRCA amnesty, so we told all amnesty applicants with

27. Alicia's name has been changed to protect her privacy. She was one of my clients at the Legalization Program of Catholic Community Services in Sacramento, California during the summer of 1987.

28. In this section, I use the "female voice" storytelling style propounded in recent law review articles on feminist legal theory. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 63-72 (1988); Note, *Overshooting The Target: A Feminist Deconstruction Of Legal Education*, 34 AM. U.L. REV. 1141-45 (1985). To a certain extent, these articles rely on a theory from C. GILLIGAN, IN A DIFFERENT VOICE (1982). Ms. Gilligan hypothesizes that women often have different ways of moral reasoning than men and, therefore, focus on contextual thought processes and interpersonal relationships rather than linear thinking and individual achievement. *Id.* at 19.

By using the female voice, I hope to draw a picture of the life of a typical single woman with children who has qualified for IRCA amnesty but who continues to face serious economic and legal hardships.

29. As a legalization counselor, I assisted IRCA amnesty applicants with the paperwork and legal processes required by the IRCA amnesty application.

any history of receipt of public assistance to stop the public assistance immediately.

After our initial interview, Alicia and I wrote and spoke on the telephone frequently to discuss how she could get a job as soon as possible and also work quickly to gather all her documents to prove that she had a history of employment without receipt of public assistance.

When we next met, Alicia had found work pitting apricots. She explained that the work involved using a small knife to take out the pits. Her hands and fingers were a testament to her labor. They were a canvas of small, thin knife cuts, all colored pale orange by the apricot juices. When I looked at her hands, I imagined the sting of the apricot juices as they ran over the cuts on her hands and fingers.

Alicia seemed to have a fatalistic view of the amnesty application process. One day I received a letter from her. Along with some documents demonstrating her employment history, she wrote that if it was the will of God for her to get amnesty then she would, but if it wasn't then she would just go on. Despite what she wrote, she gathered numerous letters and documents to establish her work history.

Alicia generally brought her two younger children to our meetings because she could not afford to pay for child care. They were the children of a man with whom she seemed to have a steady relationship. Apparently, he provided some financial support for his children. Alicia's two older children were the children of her husband who had left her a number of years ago and returned to Mexico. Alicia had no contact with him and received no child support from him.

We went to the INS interview in late July.[30] Alicia brought her youngest daughter, Maria del Carmen, and her oldest son, Juan Carlos, who was nine at the time. The INS adjudicator let the children come back to the room with Alicia and me. Maria squirmed on Alicia's lap as Alicia answered the hearing officer's questions. Although she had only been working for a few months, she was able to establish a history of employment without the receipt of public assistance. The adjudicator recommended her for approval. Alicia received her work authorization card and now has temporary residency. Presumably, she is on her way to becoming a legal, permanent resident and then a United States citizen.

However, Alicia's troubles are not over. She is still a single mother

30. Every amnesty applicant is required to meet with an INS employee, called an "adjudicator" at an INS district office. At these interviews, applicants are asked about their employment and residency history in the United States, as well as other information from the application form.

with four young children, a low paying job and no ready access to child care. Yet, the government requires her to provide for them without receiving public assistance for five years. The children are currently eligible for public assistance because they are all United States citizens, but their AFDC funds may be imputed to Alicia and defeat her application for legal, permanent residency. She faces a dilemma: continuing to receive the AFDC for her children and risking the chance to gain legal status in the United States, or refusing AFDC for her children and attempting to support them by finding permanent (most likely hourly) work and finding a way to care for her children while working.

When Alicia was recommended for approval, we were all happy. I drove Alicia, Juan Carlos, and Maria back to the bus station so they could catch the bus back to the little farming town in which they live. She offered to buy me lunch, but I had to get back to work. I thanked her and said it was okay. When I dropped Alicia and her children off at the bus station, she said in Spanish, "May the Lord praise you." I'll never forget her words; they are simple, but knowing they came from this woman who had a deep, fatalistic faith, I was really touched that she would have me in her prayers. I will never forget her. In many ways she has been the inspiration for writing this Note.

II. HISTORICAL OVERVIEW

A. The Public Charge Exclusion in the Immigration and Nationality Act

Since 1882 the INA has denied entry into the United States to aliens who are "likely to become a public charge."[31] The traditional standard for determining a public charge is a liberal,[32] prospective evaluation of the alien's ability to support herself based on such factors as age, health, vocation, and the availability of family and friends in the United States willing to ensure support.[33] This test is also referred to as a "totality of the circumstances" test.[34]

Recognizing the United States immigrant roots[35] and the belief in looking to a person's future and not her past, the United States Congress

31. INA, *supra* note 3, § 212(a)(8), (15) (codified at 8 U.S.C. § 1182(a)(8), (15) (1988)).

32. Here, the term "liberal" indicates a generous outlook, one that encourages otherwise qualified aliens to apply for legal residence in the United States.

33. Memorandum Opinion and Order, Zambrano v. INS, Civ. No. S-88-455 EJG-EM, at 3-5 (E.D. Cal. Aug. 9, 1988) [hereinafter Opinion and Order].

34. INS, Memorandum No. CO 1588-P, The Effect of the Receipt of AFDC Benefits on Eligibility for Legalization 1 (Apr. 21, 1988); Opinion and Order, *supra* note 33, at 4.

35. *In re* Griffiths, 413 U.S. 717, 719 (1973).

has traditionally provided additional avenues in the INA for aliens, with limited economic means, to overcome the public charge exclusion.[36]

Pre-IRCA cases involving the public charge exclusion demonstrate that immigration courts have traditionally considered an alien's potential for future self-reliance rather than her past.[37] The Bureau of Immigration Appeals (BIA) has held that the mere receipt of public assistance in the past does not establish that an alien is likely to become a public charge.[38] The BIA has also held that "a healthy person in the prime of life cannot ordinarily be considered likely to become a public charge."[39]

The INA also contains provisions that allow an alien to overcome the public charge exclusion even though circumstances in her background would ordinarily preclude her from meeting the traditional prospective standard. For example, an alien with a public charge exclusion problem can post a bond[40] or submit an "affidavit of support"[41] to the INS from "any responsible person" in the United States willing to ensure her support.[42]

B. Legislative History of the Public Charge Exclusion in the IRCA

The legislative history of the IRCA indicates that Congress intended to liberalize the traditional standard for the public charge exclusion, with the express purpose of allowing large numbers of aliens, including those with low incomes, to qualify for amnesty.[43]

Congress liberalized the public charge exclusion in three ways. First, Congress established a two-tiered system approach to overcome the public charge exclusion. Initially, applicants may try to meet the traditional prospective standard described above.[44] For those applicants who do not qualify for admission under this traditional standard, Con-

36. *See supra* and *infra* notes 31-42 and accompanying text.

37. *In re* Perez, 15 I&N Dec. 136, 137 (BIA 1974).

38. *Id.*

39. *In re* Martinez-Lopez, 10 I&N Dec. 409, 421 (BIA 1962).

40. Plaintiffs' Brief in Support of Motion for Temporary Restraining Order/Preliminary Injunction at 21, Zambrano v. INS, No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988) [hereinafter Plaintiffs' Brief].

41. *Id.* (citing C.F.R. § 42.91(a)(15)(4) (1989) (permitting "any responsible person" to submit affidavits of support)). An affidavit of support, referred to by the INS as a Form I-134, allows an alien to demonstrate that she has friends or relations willing to support her in this country.

42. *Id.*

43. *See* 130 CONG. REC. 16,727-29 (1984); *see also* H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 71, 72 (1986).

44. *See supra* notes 31-39 and accompanying text.

gress created the Special Rule.[45]

Under the Special Rule, applicants can overcome the public charge exclusion by "showing a history of employment without receipt of public cash assistance."[46] The IRCA defines public cash assistance to include AFDC, general assistance, and social security.[47] With the Special Rule, Congress intended to create a system that offered options to people who would not otherwise qualify for amnesty under the IRCA.[48]

Secondly, the IRCA defines "history of employment" under the Special Rule as a history that demonstrates continuous employment, regular attachment to the workforce, an income earned over a substantial period of time, and the capacity to exist and maintain a family without the use of public assistance.[49] Under the Special Rule, even an applicant who cannot meet the traditional prospective standard because of advanced age or ill health, for example, may still qualify for amnesty if she can establish that, in the past, she has been able to exist on her income and maintain her family without the receipt of public assistance.[50]

As a final measure, Congress established a general waiver process in the initial application stage[51] that permits applicants who cannot meet the public charge exclusion test to qualify on humanitarian grounds.[52]

The legislative history of the IRCA demonstrates that the INS regulations are too restrictive. Congress intended large numbers of people to qualify under the IRCA program.[53] It specifically recognized that large numbers of undocumented persons live at or below the poverty level.[54]

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45. *See supra* and *infra* notes 43-58 and accompaning text.

46. INA, *supra* note 3, § 245A(d)(2)(B)(iii), *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. § 1255a (d)(2)(B)(iii) (1988)).

47. The code states that " 'public cash assistance' means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels." 8 C.F.R. § 245a.1(i) (1987).

48. *See* H.R. REP. NO. 682, 99th Cong., 2d Sess., pt.1, at 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653.

49. 8 C.F.R. § 245a.2(k)(4) (1989).

50. *Id.*

51. When Congress passed the IRCA, it created two stages for applicants to go through in order to attain permanent residency status. IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. §§ 1255a(a)-(b)(1) (1988)).

52. INA, *supra* note 3, § 245A (d)(2)(B)(i), *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. 1255a(d)(2)(B)(i) (1988)). It does not appear that a BIA judge has yet ruled on a definition of "humanitarian grounds" in the IRCA context. However, in *In re* P-, 1989 Fed. Immigr. L. Rptr. (CCH), Interim Dec. No. 3090 (BIA Nov. 1988), the BIA held that "Congress contemplated that waivers under section 245A of the Act be granted liberally." *Id.* at 8.

53. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 49, 72 (1986).

54. Plaintiffs' Brief, *supra* note 40, at 22 (citing H.R. REP. NO. 682, *supra* note 53, at 49).

The INS regulations are too restrictive because they preclude from qualification many applicants who have received public assistance to support their children. Additionally, Congress indicated that it did not require strict compliance with all the grounds for exclusion when it stated that applicants should be "in compliance with *most* of the [thirty-three] grounds of exclusion in current law."[55]

Through the Special Rule for public charge determination, Congress intentionally demonstrated more flexibility than it has historically displayed in immigration legislation.[56] The House Judiciary Committee, in particular, recognized that "a generous program" for amnesty was necessary to effectuate true immigration reform.[57] Congress was aware of the special needs of many people who would qualify under the amnesty programs and the necessity for state and federal governments to address these needs through public assistance programs.[58] The comments of the congressional committees reflect their intent that the legislation make allowances for the difficult economic situation of many amnesty applicants.

III. THE INS MISINTERPRETS THE IRCA AND THE EFFECT ON APPLICANTS AND POTENTIAL APPLICANTS

A. The Creation of a Retrospective Test

The INS exceeded its statutory authority when it promulgated regulations on the public charge exclusion that misinterpreted and ignored the Congressional intent to use a prospective test to allow large numbers of aliens to qualify for amnesty.[59] The regulations establish a purely retrospective test that defeats the purpose of the IRCA.[60]

The Special Rule enacted by Congress gives applicants greater opportunities to meet the public charge exclusion test. It states: "an alien is not ineligible for adjustment of status under this section due to being inadmissible under section 212(a)(15)[61] if the alien demonstrates a his-

55. *Id.* at 72 (emphasis added).

56. 130 CONG. REC. 16,727-29 (1984).

57. *See* H.R. REP. No. 682, *supra* note 53, at 71-72.

58. H.R. REP. No. 1,000, 99th Cong., 2d Sess. 74 (1986).

59. *See infra* notes 61-80 and accompanying text.

60. *Id.*

61. Section 212(a) of the INA lists 33 exclusions that preclude otherwise admissible aliens from legally emigrating to the United States. They range from membership in a communist party and conviction for narcotics smuggling to "sexual deviance" and the likelihood that an alien will "become a public charge." INA, *supra* note 3, § 212(a) (codified at 8 U.S.C. § 1182(a) (1988)).

tory of employment in the United States evidencing self-support without receipt of public assistance."[62] This rule clearly liberalizes the traditional standard for determining when an applicant is "likely to become a public charge" by giving applicants two ways to avoid the public charge exclusion.[63] The first way is the traditional prospective test developed from section 212(a)(15) of the INA.[64] The second is the "history of employment . . . without receipt of public assistance" test.[65] With these two opportunities to avoid the public charge exclusion, two types of applicants may now qualify for amnesty: (1) applicants with a history of employment without the receipt of public assistance who are unable to meet the prospective test because of advanced age or ill health and (2) applicants who have received public assistance, but who have the capacity to support themselves and their families in the future.

Unlike the Special Rule, the INS regulations make the public charge exclusion standard more restrictive.[66] The INS Proof of Financial Responsibility regulations state: "An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the INA relating to excludability of aliens likely to become public charges *unless* the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance."[67] The PFR regulations conflict with the language of the congressional statute since the regulations do not require a finding of inadmissibility under the traditional prospective standard *before* evaluating an applicant's work history and receipt of public assistance. Thus, under the PFR regulations the applicant is subject to exclusion unless she demonstrates both a history of employment and the absence of public assistance.

The PFR regulations are more restrictive than the statute in four specific ways.[68] First, the regulations redefine the requirements of the public charge exclusion by stating that applicants are ineligible for legalization unless they meet the history of employment without receipt of public assistance test.[69] Second, the INS attributes public assistance re-

62. INA, *supra* note 3, § 245A(d)(2)(B)(iii), *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. 1255a(d)(2)(B)(iii) (1988)).

63. *See supra* notes 31-58 and accompanying text for discussion of the public charge exclusion.

64. *See supra* notes 31-42 and accompanying text for discussion of the prospective test.

65. IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. § 1255a(d)(2)(B)(iii) (1988)).

66. *See infra* notes 68-76 and accompanying text.

67. 8 C.F.R. § 254a.2(d)(4) (1989) (emphasis added).

68. Plaintiffs' Brief, *supra* note 40, at 19.

69. *Id.*

ceived by members of the applicant's family to the alien applicant.[70] Third, contrary to the plain language of the Special Rule, the PFR regulations require aliens who do not meet the PFR guidelines to submit applications for a waiver.[71] Fourth, the regulations limit the submission of Affidavits of Support to spouses and parents of applicants, undermining preexisting law that accepts affidavits from "any responsible person."[72] In addition, under the PFR regulations, public charge bonds are not available, as they were under the general INA provisions.[73]

The PFR regulations require proof that applicants have never received public assistance, or that they are self-supporting without a need for public assistance.[74] However, the IRCA clearly mandates legalization for all aliens who meet either the traditional test of admissibility[75] or the Special Rule test.[76]

These restrictive standards make it especially difficult for single women with children to overcome the public charge exclusion. Because they are the primary caretakers of their children,[77] it is usually more difficult for these women to find employment due to child care needs.[78] Consequently, these women are more likely to need public assistance.

According to the INS regulations, receipt of AFDC is imputed only to applicants legally considered family of an AFDC recipient.[79] Therefore, only a parent not living with an AFDC recipient can apply for amnesty without facing the public charge exclusion. The vast majority of all AFDC families, which are headed by single women, are excluded from amnesty under these regulations.[80]

B. Inconsistency of the INS Regulations

The plaintiffs in *Zambrano* argue that the INS issued inconsistent

70. *Id.* at 20; 8 C.F.R. § 245a.1(i) (1989).

71. Plaintiffs' Brief, *supra* note 40, at 20-21.

72. *Id.* at 21.

73. *Id.*

74. 8 C.F.R. § 245a.2(d)(4) (1989).

75. 8 U.S.C. § 1255.a(a)(4)(A) (1987); *see supra* notes 31-42 and accompanying text for an explanation of this admissibility test.

76. 8 U.S.C. § 1255a(d)(B)(iii) (1987).

77. *See* Declaration of Marta Zambrano at 1, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988); Declaration of Martha Ozuna at 1, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988).

78. Only 15 percent of divorced women in the United States are awarded spousal support. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1985, at 6 (Current Population Reports No. 152, Series P-23, 1985).

79. 8 C.F.R. § 245a.1(i) (1989).

80. Plaintiffs' Complaint, *supra* note 9, at 3-4.

regulations regarding the public charge exclusion.[81] These inconsistencies, coupled with a failure to accurately publicize the correct public charge standards,[82] created great confusion and discouraged many potential amnesty applicants.[83]

The final INS regulations for the IRCA program were not published until May 1, 1987, three days before the program was to begin.[84] Both the INS and the Qualified Designated Entities,[85] the community organizations designated by the INS to offer assistance to applicants, had little time to adequately understand the regulations so as to effectively advise amnesty applicants.[86] This lack of complete understanding contributed to the climate of confusion.[87]

Additionally, declarations of the *Zambrano* plaintiffs and QDE employees indicate that the QDEs were misinformed about the meaning of the regulations.[88] Community and church groups were chosen to serve as liasions between the INS and undocumented people because undocumented people generally fear the INS and feel comfortable in seeking help from the QDEs. However, with the inconsistent interpretations of the regulations and their arbitrary enforcement, the QDEs sometimes added to the confusion by telling applicants they could not qualify for amnesty because their United States citizen children received AFDC,[89] or that they should first get a job and give up public assistance before applying for amnesty.[90]

In his August 9, 1988 order, Judge Garcia agreed with the *Zambrano* plaintiffs' argument that the INS created confusion by failing to

81. *Id.* at 4.

82. Plaintiffs' Supplemental Brief in Support of Motions for Preliminary Injunction and Class Certification and in Opposition to Defendant's Motion to Dismiss at 10-11, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988) [hereinafter Plaintiffs' Supplemental Brief].

83. *See supra* note 29, 30 and accompanying text and *infra* notes 84-90 and accompanying text.

84. Plaintiffs' Complaint, *supra* note 9, at 16.

85. *See supra* note 24.

86. Declaration of David Perez at 3, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988); Declaration of Penelope Seator at 1-2, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988).

87. Conversation with Frances Martinez, Director of the Legalization Program of Catholic Community Services (July 1987); *id.* (Apr. 1988).

88. Declaration of Maria Santana at 2, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988); Declaration of Raoul Aroz at 2, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988); Declaration of Andres Bustamante at 1, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988).

89. Declaration of Andrea Ruiz at 2, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988).

90. Declaration of Marta Zambrano, *supra* note 77, at 1.

accurately and sufficiently establish and publicize the true nature of the public charge exclusion.[91] The judge observed that the INS was responsible for the lack of clarity and noted that the INS had to clarify its own interpretation of the regulations three times.[92]

C. Effect of the Regulations

Three groups of potential applicants are most adversely affected by the INS regulations. First, many women are denied the IRCA amnesty because of the public charge exclusion.[93] A second group of women are deterred from applying due to the inconsistency of the INS in applying the public charge exclusion.[94] A third group of women qualified for the first stage of amnesty, but face problems qualifying for the second stage and attaining permanent legal status.

1. Those Who Are Prevented From Qualifying

Two groups of women are effectively prevented from qualifying for the IRCA amnesty. They have either been denied amnesty or missed the application deadline because of confusion about the public charge exclusion regulations. These two groups are included in the *Zambrano* suit.[95]

(a) *Women who did not qualify.*—Although the overall qualification rate is extremely high, a large percentage who have not qualified are single women with children.[96] These applicants were uncertain about the applicable standard[97] for the public charge exclusion, and went to great expense[98] in applying for amnesty only to be denied.[99]

Graciela Lopez[100] is an example of an applicant who applied for amnesty but was recommended for denial because her United States citizen children received AFDC.[101] She is twenty-seven years old and the

91. Order of July 31, 1989, *supra* note 15, at 14.
92. *Id.* at 13.
93. Plaintiffs' Complaint, *supra* note 9, at 13.
94. *Id.*
95. *Id.*
96. Conversation with Beth Zacovic, Legal Aid Attorney (Feb. 1988). The INS refused to comply with discovery orders that would allow Legal Aid and the CRLA to compile statistics showing this fact. The CRLA and Legal Aid are currently seeking sanctions for the INS refusal to comply.
97. See *supra* notes 43-80 and accompanying text for a discussion of the varied "standards."
98. Declaration of David Perez, *supra* note 86, at 2.
99. *Id.*
100. Ms. Lopez is one of the named plaintiffs in the *Zambrano* suit.
101. Declaration of Graciela Lopez at 1, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988).

mother of five children, all born in the United States.[102] Ms. Lopez's children received AFDC intermittently from 1982 to 1987 because she was unable to work.[103] During this period Ms. Lopez gave birth to three children, including one who needed several operations.[104] Although Ms. Lopez has worked, she has had to quit her jobs to care for her children.[105] Her declaration demonstrates the plight of many single mothers: "I received AFDC for the kids because it was the only way that I could care for them when their fathers abandoned us. . . ."[106]

The difficult circumstances faced by the many undocumented single women with children demand special constitutional consideration by United States courts.[107] Their situations should have been recognized by the INS when it established regulations regarding the public charge exclusion.[108]

(b) *Women who did not apply for amnesty.*—Women in the second group of potential applicants often live in situations similar to those women who were denied amnesty. This second group has been discouraged from applying for amnesty because of the INS misinterpretation of the law and the inaccurate publicity regarding the public charge exclusion.[109] In California, for example, at least 4000 potential women applicants chose not to apply for amnesty.[110] Some did not apply because they feared they would not qualify and would be subject to deportation. Others chose to forfeit the opportunity for amnesty because their children could not survive without public assistance.[111]

Maria Santana is a single women with four children, all under the age of eight.[112] She works part-time but still cannot support her family

102. *Id.*

103. *Id.* at 2.

104. *Id.* at 1-2.

105. *Id.*

106. *Id.* at 3.

107. *See infra* notes 130-84 and accompanying text.

108. *See supra* notes 43-58 and accompanying text.

109. *See* Declaration of David Perez, *supra* note 86; Declaration of Samuel Krantz, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988); Declaration of Shari Cruhlac, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988).

110. Declaration of Beth Zacovic at 2, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. May 17, 1988). Ms. Zacovic interviewed a legislative analyst for Los Angeles County in April 1988 to obtain these statistics.

111. *See* Declaration of Marta Zambrano, *supra* note 77; Declaration of Margarita Rodriguez, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988); Declaration of Graciela Lopez, *supra* note 101; Declaration of Andrea Ruiz, *supra* note 89; Declaration of Martha Ozuna, *supra* note 77; Declaration of Jorge Perdomo, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988).

112. Declaration of Maria Santana, *supra* note 88, at 1-2.

without receipt of AFDC funds.[113] When an immigration advocacy worker told Ms. Santana that she would probably not qualify for amnesty, she did not apply.[114] She felt she had to continue to rely on AFDC to support her United States citizen children.[115]

Single women with children who have been prevented from qualifying for amnesty face immediate serious consequences. These women lack the necessary authorization to obtain legal work in the United States.[116] One possible result is the exploitation of these women in illegal sweatshops and other unhealthy work environments.[117] These women may be forced into an underclass, unable to legally support their children and permanently dependent on AFDC and other public benefits.[118] Although the INS may believe that they will return to Mexico, these women state in their affidavits that they will remain in the United States for the safety, health, and education of their children, many of whom are United States citizens.[119]

2. Women Who Do Qualify

The third group of women affected by the public charge exclusion regulations is composed of women who applied for amnesty and qualified either by overcoming the Proof of Financial Responsibility regulations or through the waiver process. These women receive work authorization and do not, at least for now, face the quandary of choosing between illegal work and returning to their native countries. Unfortunately, they still face many economic and legal hardships created by the INS regulations.

All applicants who receive temporary residency status under the first stage of the IRCA amnesty program must apply to become legal permanent residents [hereinafter LPRs] eighteen months after their grant of temporary residency.[120] This is the second stage of the IRCA amnesty

113. *Id.*

114. *Id.*

115. *Id.* at 2.

116. The IRCA has changed United States immigration law so that it is now illegal to hire undocumented aliens. INA, *supra* note 3, § 274A, *amended by* IRCA, *supra* note 2, § 101(a) (codified as amended at 8 U.S.C. § 1324a (1988)). Successful IRCA applicants become documented aliens and, therefore, receive legal authorization to work. *Id.*

117. *See* Stevenson, *Jobs Being Filled by Illegal Aliens Despite Sanctions*, N.Y. Times, Oct. 9, 1989, at A1, col. 3.

118. *Id.*; *see also* Plyler v. Doe, 457 U.S. 202, 208 (1982) (Denial of public education may result in illegal aliens becoming "permanently locked in the lowest socio-economic class.").

119. Declaration of Graciela Lopez, *supra* note 101; Declaration of Marta Zambrano, *supra* note 77.

120. 8 C.F.R. § 245a.3(a) (1989).

program.

When they apply for LPR status, these applicants again face the INS Proof of Financial Responsibility regulations. In the second stage, however, waivers are limited to applicants who were eligible for social security benefits during the month they were granted temporary status.[121] Applicants receiving other forms of public assistance probably will be denied permanent residence.[122]

In addition to the PFR regulations and the loss of potential waivers, those who qualify for amnesty are banned from the receipt of most forms of public assistance for five years from the date that they become legal temporary residents.[123] Since the INS regulations impute the receipt of public assistance by United States citizens to a family member applicant, the continuing receipt of public assistance, by children or other family members, can disqualify an applicant from the amnesty program in the second stage.[124] Applicants may continue to receive limited, mostly nonfinancial, emergency assistance and some Medicaid services.[125] Their U.S. citizen children remain eligible for programs like AFDC but, as explained previously, the receipt of public assistance may be imputed to the mother in her amnesty application.[126] As in the first stage, many women must choose between the receipt of public assistance to keep their family financially solvent and the loss of that financial security to complete the second stage of the amnesty process. Because many single women with children cannot survive financially without assistance, many who made it through the first stage are forced to forego completing the process. This situation is less likely to be faced by single men or married people because these two classes do not have the same child care concerns as single women with children.[127] Married people have the option of having one parent work while the other cares for the children or having both work and paying for child care. Single men generally do not have children for whom they are responsible on a daily basis. These two groups, therefore, are less likely to be dependent on public assistance.[128]

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121. *Id.* § 245a.3(g)(3)(ii).

122. IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. § 1255a(d)(2)(B)(ii)(II) (1988)).

123. *Id.* (codified at 8 U.S.C. § 1255a(h)(1) (1988)).

124. 8 U.S.C. 1255a(b)(c)(i) (1988). One of the requirements for admissibility is that the person not be "like[ly] to become a public charge." INA, *supra* note 3, §§ 212(a)(8), (15) (codified at 8 U.S.C. §§ 182(a)(8), (15) (1988)).

125. IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. § 1255a(h)(3)-(4) (1988)).

126. 8 C.F.R. § 245a.2(k)(4) (1989); *see also* Order of July 31, 1989, *supra* note 15, at 5.

127. *See* Declaration of Marta Zambrano, *supra* note 77, at 1-2; Declaration of Martha Ozuna, *supra* note 77, at 1.

128. *See supra* note 12 and accompanying text.

Regardless whether these women choose to forego public assistance for their children, or to forego amnesty, they are entering a poverty class. This dilemma is illustrated by the story of one potential applicant who became homeless because she gave up public assistance to apply for amnesty.[129]

IV. VIOLATIONS OF CONSTITUTIONAL GUARANTEES AND INTERNATIONAL LAW

The discriminatory impact of the INS public charge exclusion regulations on single women with children violates the Equal Protection Clause of the United States Constitution and a number of international human rights treaties.

A. The Equal Protection Argument

The benefits of legalization are not available on an equal basis to all potential amnesty applicants. A significant number of women are adversely affected by the INS regulations to the IRCA amnesty program solely because of their status as single women with children. This violates the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[130] To establish an equal protection violation, applicants and potential applicants under the IRCA program must demonstrate that the INS regulations fail to meet one of the equal protection standards enunciated by the United States Supreme Court.[131] The Equal Protection Clause "introduced a new concept into constitutional analysis by requiring that individuals be treated in a manner similar to others as an independent constitutional guarantee."[132]

The Supreme Court has developed three standards of review. The first standard of review is the rational relationship test and is generally applied to economic and social legislation.[133] The Court asks whether the classification bears a rational relationship to a related state interest.[134] The second standard, the strict scrutiny test, requires that the government show a compelling reason for its regulation and that the par-

129. Declaration of Mavis Anderson, Zambrano v. INS, Civ. No. S-88-455 EJG-EM (E.D. Cal. Apr. 12, 1988).

130. Plaintiffs' Brief, *supra* note 40, at 27, 28; Declaration of Andres Bustamante, *supra* note 88, at 1.

131. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 590-99 (2d ed. 1983) [hereinafter J. NOWAK] for a discussion of such standards.

132. *Id.* at 585.

133. *Id.* at 591.

134. *See generally* New Orleans v. Dukes, 427 U.S. 297 (1976).

ticular classification is necessary to achieve that compelling interest,[135] or it requires the plaintiff to demonstrate that a fundamental right[136] has been abridged by a government regulation.

An intermediate test is applied to discrimination based on gender[137] or legal status as an undocumented child.[138] The intermediate test requires that the classifications "serve important governmental objectives and . . . be substantially related to achievement of those objectives."[139] Although the Court traditionally applies the strict scrutiny[140] standard to alienage, it has held that undocumented people are not a suspect class.[141] There is some argument that a significant level of scrutiny should be applied to invalidate state restrictions on certain benefits to undocumented people, such as emergency health care.[142] The Court has never addressed whether there can be a special group of adult undocumented people, such as single women with children, who deserve treatment distinct from the group of adult undocumented people as a whole.[143] Therefore, this discussion uses the Court's intermediate standard to evaluate the application of the Equal Protection Clause to single women with children.

In cases that determine the rights of aliens to public benefits, the United States Supreme Court has consistently found that undocumented people are "persons" guaranteed due process of law by the fifth and fourteenth amendments.[144] The Court has also held that the fifth amend-

135. J. NOWAK, *supra* note 131, at 591-92.

136. Fundamental rights have been defined as those "rights which the Court recognizes as having a value so essential to individual liberty in our society that they justify the justices reviewing the acts of other branches of government in a manner quite similar to the substantive due process approach of the pre-1937 period." *Id.* at 457. The authors go on to say that since the concept of fundamental rights is based in natural law, it is difficult to develop a more precise definition. *Id.*

137. Craig v. Boren, 429 U.S. 190 (1976).

138. Plyler v. Doe, 457 U.S. 202 (1982).

139. *Craig*, 429 U.S. 190.

140. "This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end." J. NOWAK, *supra* note 131, at 591 (citing Horton v. Califano, 472 F. Supp. 339, 343 (W.D. Va. 1979)).

141. *Plyler*, 457 U.S. at 223. "Suspect class" has been defined as "a traditionally disfavored class in our society . . . more likely to be used without pausing to consider its justification." Mathews v. Lucas, 427 U.S. 495, 521 (1976) (Stevens, J., dissenting).

142. *See* Note, *State Legislation Denying Subsistence Benefits to Undocumented Aliens: An Equal Protection Approach*, 61 TEX. L. REV. 859, 861 (1983).

143. This theory was suggested to the author during a conversation with Professor Ray Forrester, University of California, Hastings College of the Law (Aug. 31, 1987).

144. Shaunghnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

ment protects undocumented persons from "invidious discrimination."[145] Additionally, the Court has held that the government cannot, through its actions, create a subclass of residents,[146] and that an entitlement to benefits should be determined by examining the nature and character of the undocumented person's relationship with the United States.[147] Thus, the case law establishes that constitutional guarantees, including the right of equal protection, apply to undocumented people residing in the United States. The Supreme Court's focus on the nature and character of an undocumented person's relationship to the United States gives weight to the proposition that single women with United States citizen children are a class distinct from the adult undocumented population in general. This class, therefore, should be given separate equal protection consideration.

In 1982 the Supreme Court decided *Plyler v. Doe*,[148] a case involving a state statute that denied "illegal alien"[149] children the right to public school education.[150] The Court held that denying these children the right to a public school education violated the Equal Protection Clause.[151] The *Plyler* Court did not base its decision on the children's status as a suspect class or on public education as a fundamental right.[152] Instead, the Court held that the children were special members of an "underclass" of undocumented people.[153] The Court further found that the statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[154]

The Court based its decision on the children's natural innocence and inability to control their status.[155] Although the Court expressly stated that education is not a fundamental right,[156] it also commented that "education prepares individuals to be self-reliant and self-sufficient participants in society."[157]

145. *See* Mathews v. Diaz, 426 U.S. 67, 77-80 (1976).

146. Plyler v. Doe, 457 U.S. 202, 213 (1982).

147. *Mathews*, 426 U.S. at 80.

148. 457 U.S. 202.

149. "Illegal aliens" are people who immigrate to the United States without proper visas or legal permission. The immigration rights community prefers the term "undocumented person" to "illegal alien." *See supra* note 10.

150. *Plyler*, 457 U.S. 202.

151. *Id.* at 213.

152. *Id.* at 223.

153. *Id.* at 219-20.

154. *Id.* at 223.

155. *Id.* at 220, 223-24.

156. *Id.* at 221.

157. *Id.* at 222 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

The Court noted the especially difficult circumstances under which undocumented people live.[158] In addition, the majority acknowledged the contributions these people have made to the economy of the United States.[159] Finally, the Court stated that the status of undocumented people is not immutable, since many are likely to become legal residents.[160]

The *Plyler* justifications for treating undocumented children as a class requiring greater protection may be applicable to single women with children under the IRCA. The groups share many of the same disadvantages. In *Plyler*, the Court held that illegal children, because of their innocence and inability to control their status, are not "comparably situated" to undocumented adults.[161] Like undocumented children, single women with children are "special members of [an] underclass."[162] While this class of women may not have the "innocence" of children, because of their inability to control their status they are not "comparably situated"[163] to other adult undocumented people.

It is because these women have children that they are at a disadvantage to other undocumented people. The disproportionality of the burden of child care and support is evidenced by the statistic that almost ninety percent of all AFDC families are headed by single women.[164] Because of their status, these single women are denied legalization under the INS regulations.[165]

The vast majority of undocumented people come to the United States to find work.[166] Unfortunately, single undocumented women with children are unable to find sufficient work to support themselves and their United States citizen children, largely because they must care for their children.[167] Because of these disadvantages, these women must rely on public assistance.[168] However, the PFR regulations deny amnesty to anyone receiving public assistance.[169] Like the Texas statute in

158. *Id.* at 208.
159. *Id.*
160. *Id.* at 220, 226.
161. *Id.* at 220.
162. *Id.* at 219.
163. *Id.* at 220.
164. Plaintiffs' Brief, *supra* note 40, at 27.
165. *See* Plaintiffs' Complaint, *supra* note 9; *see also* Plaintiffs' Brief, *supra* note 40, at 28.
166. Plyer v. Doe, 457 U.S. 202, 228 (1982).
167. Declaration of Andrea Ruiz, *supra* note 89; Declaration of Marta Zambrano, *supra* note 77; Declaration of Graciela Lopez, *supra* note 101; Declaration of Martha Ozuna, *supra* note 77.
168. Declaration of Andrea Ruiz, *supra* note 89, at 1-2; Declaration of Marta Zambrano, *supra* note 77, at 2; Declaration of Graciela Lopez, *supra* note 101, at 1-2.
169. *See supra* notes 66-80 and accompanying text.

Plyler, the PFR regulations "impose a lifetime hardship on a discrete class . . . not accountable for their disabling status."[170] If an exception is not made for these women, they will be unfairly denied their right to amnesty.

The majority in *Plyler* stated that one of the goals of the Equal Protection Clause is the "abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[171] The Court also stated that "the Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[172] The INS regulations violate these women's equal protection rights because the regulations are "unreasonable obstacles" to amnesty and indirectly discriminate against them as a class.[173] The *Plyler* Court stated:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[174]

This argument is equally applicable here.

The intermediate test of the equal protection standard requires the INS to show that these regulations further a substantial goal of the state.[175] The legislative history of the INA and the IRCA indicates that Congress and the INS promulgated public charge exclusion regulations in order to control the use of public assistance by the public.[176] However, the *Plyler* Court placed doubt on the adequacy of this goal when it stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[177]

The *Plyler* Court discounted three arguments made by the State of Texas. The same arguments are raised by the INS and the rationale for discounting them applies here. First, the State of Texas in *Plyler* argued that it must protect itself from an influx of "illegal" immigrants.[178]

170. Plyler v. Doe, 457 U.S. 202, 223 (1982).
171. *Id.* at 222.
172. *Id.* at 213.
173. *Id.* at 222.
174. *Id.* at 218-19.
175. *Id.* at 224.
176. S. REP. NO. 485, 97th Cong., 2d Sess. (1982) (comments on S. 2222).
177. Plyler v. Doe, 457 U.S. 202, 227 (1982) (citing Graham v. Richardson, 403 U.S. 365, 374-75 (1971)).
178. *Id.* at 228.

Since the IRCA amnesty program is a one time program,[179] changing the regulations to meet congressional intent will not result in an influx of illegal aliens. Second, Texas argued that expanding the government program would involve additional administrative costs to the state.[180] Although allowing otherwise qualified amnesty applicants to apply for amnesty now will cost the INS additional money, had the INS originally enacted regulations that met the intent of Congress, this would never have occurred. Eligible amnesty applicants should not suffer due to the administrative bungling of the INS. Finally, Texas argued that because of their undocumented status and possible lesser ties to the state, undocumented persons are less likely to remain in the state and, therefore, deserve less support from the government.[181] As the Supreme Court acknowledged, however, many undocumented persons do stay in this country and many attain legal status.[182] These women are not permanently in a class unable to work. In fact, all of the named plaintiffs in *Zambrano* have worked when they did not have primary caretaker responsibility for their young children.[183] It is reasonable to conclude that once their children are beyond the age of needing full-time care, these woman will return to work. If they do not receive legal status now, they will be subject to exploitation in illegal jobs.[184] Whatever their status, undocumented people continue to contribute to the economy and cultural richness of the United States.

There is no legitimate interest in creating regulations contrary to the intent of Congress. Additionally, even if the regulations arguably meet congressional intent, there is no legitimate governmental interest in creating a statute that discriminates against single women with children.

B. International Treaty Arguments

The United States is a signatory to a number of treaties and human rights declarations that provide protection to the class of single women with children who have been denied or discouraged from applying for immigration amnesty under the IRCA program. Through its misinterpretation of the congressional intent[185] behind the IRCA and the denial

179. *See* IRCA, *supra* note 2, § 201(a) (codified at 8 U.S.C. § 1255a(a)(1)(A) (1988)).

180. *Plyler*, 457 U.S. at 229.

181. *Id.* at 230.

182. *Id.*

183. *See* Declaration of Marta Zambrano, *supra* note 77; Declaration of Margarita Rodriguez, *supra* note 111; Declaration of Martha Ozuna, *supra* note 77; Declaration of Andrea Ruiz, *supra* note 89.

184. See *supra* notes 116-118 and accompanying text.

185. *See supra* notes 43-80 and accompanying text.

of equal protection to single women with children,[186] the INS violates these international treaties.

In addition to violating equal protection rights provided in these treaties and in the United States Constitution, the INS public charge exclusion regulations clearly violate the equal work rights enunciated in many international declarations and covenants to which the United States is a signatory.[187] Women who are denied access to the IRCA amnesty do not have the same right to work as other women and men because work authorization is now required by the IRCA in order to obtain legal, safe, and decent work.[188]

1. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter UN Convention] includes several provisions that implicitly protect the rights of women who have been denied or discouraged from applying for immigration amnesty under the IRCA program.[189] In its call for equal treatment of women, the UN Convention parallels the principles underlying the Equal Protection Clause of the United States Constitution. For example, article 2 of the Convention states generally that "All appropriate measures shall be taken to abolish . . . regulations . . . which are discriminatory against women."[190] This applies directly to the PFR regulations that have a de facto adverse impact on single women with children.

Two articles specifically address the rights of women in immigration. Article 5 requires that women shall "have the same rights as men to acquire, change, or retain their nationality."[191] Article 6 reinforces this directive by stating that women shall have "the same rights as men with regard to the law on the movement of persons."[192] However, the PFR regulations deny single women with children the right that men

186. *See supra* notes 130-84 and accompanying text.

187. *See* UNITED NATIONS MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL (1987) [hereinafter MULTILATERAL TREATIES]; *supra* and *infra* notes 186-207 and accompanying text.

188. *See supra* notes 116-17 and accompanying text.

189. This treaty was signed by the United States on July 17, 1980. As of December 1987, it had not yet been ratified by the United States Senate. MULTILATERAL TREATIES, *supra* note 187, at 161.

190. *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263, 22 U.N. GAOR Supp. (No. 16) at 35, U.N. Doc. A/6716 (1967) [hereinafter *Discrimination Declaration*].

191. *Id.* art. 5, at 36.

192. *Id.* art. 6(1)(c).

have to change their nationality. The regulations also deny them equality "with regard to the law on the movement of persons."[193]

Finally, article 10 calls for governments to ensure women an equal right to work.[194] A key provision of the IRCA requires that non-United States citizens obtain work authorization in order to work legally in the United States.[195] Through the PFR regulations, the INS denies many single women with children the right to work legally, and therefore, subjects them to a continued need for public assistance or the reliance on illegal dead-end jobs.

2. The United Nations Universal Declaration of Human Rights

The United Nations Universal Declaration of Human Rights [hereinafter Universal Declaration] also includes articles that advocate the equal rights of women and forbid discrimination. Article 2 of the Universal Declaration includes a blanket provision giving all human beings equal rights regardless of race, religion, or gender.[196] Article 7 explicitly grants "equal protection against any discrimination in violation of this Declaration."[197] Article 15 deals with immigration rights, stating that "No one shall be arbitrarily . . . denied the right to change his nationality."[198]

Two articles in the Universal Declaration focus on social rights. Article 23 guarantees the right to work,[199] a right that will be denied if these otherwise qualified women are not allowed to apply for the IRCA amnesty. Article 25 offers special protection to mothers and children, stating that "[m]otherhood and childhood are entitled to special care and assistance."[200] This article supports the idea that mothers deserve special consideration in obtaining amnesty.

3. The International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights [hereinafter the Covenant], along with the Universal Declaration

193. *Id*; *see also supra* notes 71-79 and accompanying text.

194. *Discrimination Declaration*, *supra* note 190, art. 10, at 36-37.

195. INA, *supra* note 3, § 245A(b)(3), *amended by* IRCA, *supra* note 2, § 201(a) (codified as amended at 8 U.S.C. § 1255a(b)(3) (1988)).

196. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

197. *Id.* art. 7.

198. *Id.* art. 15(2).

199. *Id.* art. 23.

200. *Id.* art. 25(2).

of Human Rights, is part of the International Bill of Human Rights.[201] The Preamble of the Covenant recognizes that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his [or her] civil and political rights. . . ."[202]

Article 6 of the Covenant, mirroring the Convention on the Discrimination Against Women and the Universal Declaration, formally recognizes the right to work.[203]

Article 7 requires all parties to the Covenant to recognize the rights of everyone to fair wages, a decent living for themselves and their families, and safe and healthy working conditions.[204] This article includes a phrase that expressly calls for "women [to be] guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."[205] The Covenant also includes an article calling on member nations to ensure the realization of "the right of everyone to an adequate standard of living for himself [or herself] and his [or her] family."[206]

It is interesting to note that throughout this Covenant, the word "everyone,"[207] is used, not "citizen" or "legal person," implying that these rights apply to every person currently living in a member country.

V. PROPOSALS

The Ninth Circuit should uphold the District Court order invalidating the PFR regulations that make the public charge exclusion more restrictive. The regulations should be declared invalid because they violate the congressional intent of the IRCA and they seriously undermine the equal opportunity of single women with children to qualify for the IRCA amnesty. The two primary culprits are the Proof of Financial Responsibility regulation and the regulation attributing federal benefits received by United States citizen children to their undocumented parents.

The Ninth Circuit should reverse the District Court decision and

201. UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.2, U.N. Sales No. E.83.XIV.1 (1983).

202. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, annex, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) (preamble) [hereinafter International Covenant].

203. *Id.* art. 6, at 50. The United States signed this treaty on October 5, 1977. As of December 1987, it had not been ratified by the United States. MULTILATERAL TREATIES, *supra* note 187, at 118.

204. International Covenant, *supra* note 202, art. 3, at 50.

205. *Id.* art. 7(a)(i).

206. *Id.* art. 11(1).

207. *See, e.g., id.* arts. 6, 7.

grant a reasonable extension for the filing of legalization applications to those applicants and potential applicants adversely affected by these regulations and their interpretations. Thousands of people have been deterred from applying because of the inconsistency of the INS position on the public charge exclusion standard. These potential applicants should be given a chance to apply and qualify for the IRCA amnesty.

Congress should take additional legislative action to clarify its intended liberal interpretation of the public charge exclusion standard, thereby bypassing the delays inherent in the continued adjudication of the present law. Congress should also pass legislation compelling the INS to institute a program that accurately and sufficiently publicizes the standards for eligibility under the legalization program. The legislation could copy Judge Garcia's order and require that the INS work with the QDEs, district offices, and other community and immigrant's rights organizations to notify all potentially qualified applicants.

With respect to the public charge exclusion regulation, the INS should promulgate new regulations for the second stage of the amnesty program that comply with the liberal intent of Congress. These regulations must establish clear guidelines in order to prevent the ambiguities and arbitrariness that have plagued the public charge exclusion issue during the first stage of the amnesty program.

VI. CONCLUSION

Congress enacted the IRCA's public charge exclusion statute with two goals in mind. First, Congress wanted to ensure that the new temporary residents would not become welfare dependent and overburden the welfare system. Congress was aware, however, that a majority of the potential applicants were part of the working poor living below the poverty line.[208] Congress wanted to provide an opportunity for these aliens, who have contributed so much to the economy of the United States, to qualify for amnesty. These goals are potentially contradictory and, due to the action of the INS, have resulted in seriously adverse and discriminatory consequences, especially for potential applicants who are single women with children.

Congress must afford single women with children the same opportunity to obtain amnesty as other applicants. The PFR regulations exceed statutory authority and congressional intent and violate the Equal Protection Clause and numerous international treaties. By denying amnesty to single women with children, these regulations do not further any goal

208. Wheeler & Zacovic, *supra* note 11, at 1047.

of the government and unfairly deny the right to amnesty to single women with children. Let's give all the "Alicia's" a chance.